UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT

BANKRUPTCY JUDGE

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October 7, 2004

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Subjects: *John S. Lovald, Trustee v. Thorton Capital Advisors, Inc., and Recovery Partners II, L.L.C.*
(In re The Credit Store, Inc.), Adv. No. 03-4017; Chapter 7, Bankr. No. 02-40922

John S. Lovald, Trustee v. Thorton Capital Advisors, Inc., and Recovery Partners II, L.L.C. (In re The Credit Store, Inc.), Adv. No. 04-4050; Chapter 7, Bankr. No. 02-40922

Dear Counsel:

The matter before the Court is the Motion to Consolidate Action With Adversary Proceeding No. 04-4050 (docketed in both adversaries, nos. 03-4017 and 04-4050) filed by Plaintiff-Trustee John S. Lovald on September 24, 2004, and the objection thereto filed by Defendants on October 5, 2004, which was corrected on October 6, 2004. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, the Motion to

Consolidate will be granted.

Summary. The Credit Store, Inc., ("Debtor") filed a Chapter 11 petition in bankruptcy on August 15, 2002. The case was converted to a Chapter 7 case on February 4, 2003. John S. Lovald was appointed the Chapter 7 trustee. On April 4, 2003, Trustee Lovald commenced an adversary proceeding against Thornton Capital Advisors, Inc., and Recovery Partners II, L.L.C. According to his Amended Complaint, Trustee Lovald sought to recover an alleged fraudulent conveyance (actual or constructive) under 11 U.S.C. §§ 548(a)(1)(A) and 550(a)(1). He also sought under 11 U.S.C. § 502(d) a disallowance of the Defendants' claims pending a recovery of the transferred property.

Following a dismissal motion by Defendants, Trustee Lovald consented to dismissal of his third count under § 502(d). The Court did not dismiss Counts I or II, as requested by Defendants. It did, however, direct Trustee Lovald to amend Count I to better comply with Fed.R.Civ.P. 9(b).

Trustee Lovald filed his Second Amended Complaint. Therein, Trustee Lovald essentially argued that Debtor's transfer, pursuant to Repurchase Agreement made December 31, 2001, of a second lien position on all its other assets to Defendants was either actually or constructively fraudulent. Following cross-motions for summary judgment, the Court concluded that the present record established that element of constructive fraud set forth at 11 U.S.C. § 548(a)(1)(B)(ii), and it directed that a trial be held to receive evidence under § 548(a)(1)(A) and § 548(a)(1)(B)(i). The trial was set for October 18-20, 2004.

On August 11, 2004, shortly before the applicable statute of limitations ran, Trustee Lovald commenced a second adversary proceeding, no. 04-4050, against Thorton Capital and Recovery Partners under 11 U.S.C. §§ 547(b), 548(a)(1), and 550(a)(1). In this adversary, Trustee Lovald has essentially sought to avoid as a fraudulent transfer (actual or constructive) or as a voidable preference certain Servicing Fees and Set-Up Fees that Debtor paid to Thorton Capital and Recovery Partners under a Master Servicing Agreement. The Master Servicing Agreement was

entered into on June 25, 2002, which was after the date that Thorton Capital and Recovery Partners could demand that Debtor fulfill its repurchase obligation under the earlier Repurchase Agreement, but which preceded Thorton Capital and Recovery Partners' actual, unsuccessful demand of Debtor to fulfill the repurchase obligation.

On September 24, 2004, Trustee Lovald moved to consolidate the two adversary proceedings for trial. Thorton Capital and Recovery Partners objected saying the two action do not overlap because they deal with two different agreements made at two different times.

Discussion. Under Fed.R.Bankr.P. 7042 and Fed.R.Civ.P. 42(a), adversary proceedings in bankruptcy may be consolidated when they involve "a common question of law or fact."

> Rule 42(a) [which is made applicable to all adversary proceedings under the Bankruptcy Code by Fed.R.Bankr.P. 7042] gives trial courts broad discretion and flexibility in consolidating separate actions. *Fed. Deposit Insurance Corp. v. Union Entities (In re Be-Mac Trans. Co.)*, 83 F.3d 1020, 1025 (8th Cir.1996); *Pittman v. Mem'l Herman Healthcare*, 124 F.Supp.2d 446, 449 (S.D. Tex.2000). This includes consolidating some, but not all, of the underlying issues in separate actions. *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.*, 746 F.2d 278, 287 (5th Cir.1984) quoting 5 MOORE'S FEDERAL PRACTICE ¶ 42.03[3], *rehg. granted on other grounds*[,] 760 F.2d 86 (5th Cir.1985); *aff'd* 784 F.2d 665 (5th Cir.) (en banc)[,] *cert. denied* 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986).
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> A prerequisite for consolidation of separate actions under Rule 42(a) is the presence of common questions of law and fact in those actions. *Lyons v. Andersen*, 123 F.Supp.2d 485 (N.D.Iowa 2000). Once the moving party establishes the presence of common questions of law and fact, the court must weigh the savings of time and effort that consolidation would

> promote against any inconvenience, delay or expense that consolidation would cause to the parties and the Court. *Tower Cranes of America v. Public Service Co.*, 702 F.Supp. 371, 376 (D.N.H.1988). Ultimately, the movant must demonstrate that consolidating the two actions will promote judicial convenience and economy. *Lyons*, 123 F.Supp.2d at 488.

Sachs Electric Co. v. Bridge Information Systems, Inc. (In re Bridge Information Systems, Inc.), 288 B.R. 548, 553 (Bankr. E.D. Mo. 2001). Here, common questions of fact apply, and the law at issue is the same. Judicial economy will be promoted by holding the trials together. Moreover, any delay in holding the consolidated trial will be outweighed by possible duplicate expense and effort if the actions are considered separately. Thus, consolidation for trial will be ordered.

It is true that the two adversary proceedings brought by Trustee Lovald against Thorton Capital and Recovery Partners deal with two different agreements made at two different times. However, to say the agreements are not related would be far from accurate. Instead, the present record shows that the Master Servicing Agreement was related to, if not a product of, the Repurchase Agreement and Thorton Capital and Recovery Partners' understanding that Debtor would be unable to fulfill its repurchase obligation under the Repurchase Agreement. Though those facts will ultimately need to be established at trial, to consider either the Repurchase Agreement or the Master Servicing Agreement in isolation would result in an incomplete and likely inaccurate picture of the dealings between Debtor and Thorton Capital and Recovery Partners in the several months before Debtor filed Chapter 11. The better course is to consolidate the matters for trial.

Like Thorton Capital and Recovery Partners, the Court does not want to unnecessarily delay the trial. Though the parties surely will not be ready for a consolidated trial on October 18-20, there is no reason that discovery and other pre-trial procedures in Adv. No. 04-4050 cannot be accomplished in a reasonably short period of time. Once the present motions regarding the amendment of Plaintiff-Trustee's complaint in Adv.

No. 04-4050 are resolved, a pre-trial conference will be set to establish deadlines for completing discovery in that adversary proceeding, and a new consolidated trial date will be set.

Orders will be entered granting the Trustee's motion to consolidate for trial.

Sincerely,

/s/ Irvin N. Hoyt

Irvin N. Hoyt
Bankruptcy Judge

INH:sh

CC: adversary files (docket original; serve parties in interest)